Briggs v. Nova Services
Concurrence by C. Johnson, J.

No. 79615-7

C. JOHNSON, J. (concurring)—The lead opinion and the dissent conflate the analytical framework for the cause of action for violation of a group of employees to engage in "concerted activities" under RCW 49.32.020 with the analytical framework for the tort of discharge in violation of public policy. Doing so is inconsistent with our analysis in *Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 888 P.2d 147 (1995). These claims are to be treated separately. The primary and threshold issue in this case centers on whether the employees engaged in activities that constitute a concerted activity under the meaning of RCW 49.32.020. And because their activities cannot be considered "concerted activities" for purposes of RCW 49.32.020, their claims against Nova Services must fail, which the lead opinion holds. While I concur with the lead opinion's result, I cannot agree with the lead opinion's analysis in its entirety.

In *Bravo*, we did not analyze a concerted activities claim under RCW 49.32.020 together with the tort of wrongful discharge in violation of public

policy. There we stated an important public policy exists, "that discharge which violates RCW 49.32.020 also *gives rise to a tort of discharge in violation of a clear mandate of public policy*." 125 Wn.2d at 758 (emphasis added). This means a party must establish that RCW 49.32.020 was violated before it can bring a claim for discharge in violation of public policy.[1] This also means the claim for discharge in violation of public policy requires discharge whereas proving an employer violated the employees' right to engage in concerted activities does not require discharge.[2] As such, these two claims are separate and distinct, so we should treat them as such.

Here, the lead opinion and the dissent both improperly resolve this matter. In reaching their conclusions they analyze the elements required to

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[1] This is not to say that an employee must have a remedy under the statute to bring their claim for wrongful discharge in violation of public policy. But the terminated employee must first prove that a public policy was violated, which thereby rendered such termination wrongful. *Roberts v. Dudley*, 140 Wn.2d 58, 60, 993 P.2d 901 (2000). As such, before the employees in this matter can bring a claim for wrongful discharge in violation of public policy, they must first prove that their right to engage in concerted activities (i.e., the public policy identified in RCW 49.32.020) was violated.

[2] Washington State Trial Lawyers Association Foundation, in its amicus brief, properly points out the concerted activities claim is broader in scope than the wrongful discharge claim. A concerted activities claim enables employees to prevail if they show, among other things, they were restrained, interfered with, or coerced. RCW 49.32.020. But to bring the wrongful discharge claim there must be an actual discharge, under current case law; constructive discharge is arguably sufficient. *Bravo*, 125 Wn.2d at 758 (requiring discharge to establish a prima facie action for the tort of wrongful discharge in violation of public policy); *but see Korslund v. Dyncorp Tri-Cities Servs., Inc.,* 156 Wn.2d 168, 180-81, 125 P.3d 119 (2005) (discussing "constructive discharge" positively, but not reaching the issue).

establish the tort of discharge in violation of clear mandate of public policy. But because violating the right to engage in concerted activities must be established before viability for the tort of discharge in violation of public policy even arises, the lead opinion's and the dissent's analysis is inconsistent with the analysis of *Bravo*. Generally, four situations permit a public policy tort action to sustain. One situation occurs where employees are fired for exercising a legal right or obligation (the other three situations are inapplicable to this case). *See Roberts v. Dudley*, 140 Wn.2d 58, 64 n.4, 993 P.2d 901 (2000) (identifying the four situations). Put otherwise, in such a situation, the claim for wrongful discharge in violation of public policy must be predicated on a discharge that resulted from employees exercising a legal right or obligation. Here, the legal right at stake is the right to engage in "concerted activities."

The threshold issue here, therefore, is whether the activities engaged in by the employees constitutes a concerted activity, under the statute. In *Bravo*, after adopting a dictionary definition for the term "concerted," we articulated the appropriate inquiry for a court to make: "whether the employees were alleging interference or retaliation because of activities the

employees had undertaken action in concert – together – for the purpose of improving their working conditions." 125 Wn.2d at 752. If this question is answered in the negative, the employees did not engage in a concerted activity.

Here, the employees' activities were not an effort to improve their working conditions under the meaning of the statute. Rather, the employees were simply attempting as a group to leverage out someone they considered a "bad boss," which is not sufficient to establish that Nova violated the employees' right to engage in concerted activities. The employees do not allege how their working conditions were affected, within the meaning of the statute. As such, both claims filed by the employees against Nova should fail, and I agree with the lead opinion's conclusion to affirm the trial court's entry of summary judgment in favor of Nova.

AUTHOR:
Justice Charles W. Johnson

WE CONCUR: